Supreme Court, U.S.
FILED

96 876 DEC 3 1996

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No. 96-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KEVIN P. McGEENEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE GOVERNMENT MET ITS HEAVY BURDEN UNDER *KASTIGAR V. UNITED STATES*, 406 U.S. 441 (1972), TO SHOW THAT IT MADE NO USE OF APPELLANT'S IMMUNIZED STATEMENTS.

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CORPORAL,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Kevin P. McGeeney respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (App., *infra*, 1a-15a) is reported at __ M.J. ___. The opinion of the Navy-Marine Corps Court of Criminal Appeals (App., *infra*, 16a-34a) is reported at 41 M.J. 544.

JURISDICTION

The Court of Appeals for the Armed Forces decided this case on September 5, 1996 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3)(1994).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall be . . . compelled in any criminal case to be a witness against himself . . . .

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner was convicted by a general court-martial of making a false official statement and 13 specifications of making and uttering bad checks in violation of Articles 107 and 123a, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 923a (1994). He was sentenced to five years confinement, forfeiture of all pay and allowances, a $6,000.00 fine, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved this sentence, but subsequent clemency action remitted the fine, reduced the adjudged confinement to three years, and commuted the dishonorable discharge to a bad conduct discharge. The Navy-Marine Corps Court of Criminal Appeals and the Court of Appeals for the Armed Forces affirmed the findings and sentence. (App., *infra*, 1a-34a).

B. Facts

Petitioner and Lance Corporal (LCpl) David Arbuckle were charged with making and uttering bad checks. The Government originally planned to try petitioner first, grant him testimonial immunity, and then have him testify against LCpl Arbuckle. However, delays in petitioner's case caused the Government to try LCpl Arbuckle first. Petitioner was granted testimonial immunity and was interviewed by the prosecutor, Captain (Capt) J. R. Prew. Petitioner, during the interview, incriminated himself and exonerated LCpl Arbuckle. That same day, Capt Prew was replaced by a new prosecutor, Capt F. A. Delzompo.

Capt Prew subsequently reported the substance of petitioner's immunized statements to, among others, Major (Maj) J. C. Walker, the Law Center Deputy Director and Military Justice Officer, and to Lieutenant Colonel (LtCol) K. J. Naugle, the convening authority's staff judge advocate. LtCol Naugle subsequently revealed the substance of petitioner's immunized statements to the convening authority, Major General (Maj Gen) H. Blot. Capt Prew did not discuss petitioner's immunized testimony with either Capt Delzompo or Capt Poague, the new assistant prosecutor. Capt Poague, however, became aware of the substance of petitioner's immunized statements when he examined Capt Prew during the *Kastigar*[1] hearing. Capt Delzompo was not exposed to Petitioner's immunized statements because he left the courtroom during Capt Prew's testimony.

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[1] *Kastigar v. United States*, 406 U.S. 441 (1972).

A number of prosecutorial officials took action in petitioner's case after exposure to petitioner's immunized statements. The convening authority re-referred charges against petitioner to a general court-martial following the reopening of the Article 32 investigation. He also selected new court-martial members upon the advice of LtCol Naugle. LtCol Naugle and Maj Walker participated in the convening authority's decision to withdraw certain charges and proceed with others after the military judge excluded the testimony of a Government informant who was privy to petitioner's immunized statements. Capt Poague remained on the case as the assistant prosecutor after his exposure to petitioner's immunized statements.

Petitioner, at trial, made numerous motions to dismiss the charges under *Kastigar*. The military judge denied each motion to dismiss. At the conclusion of the trial, the military judge found no Government use of petitioner's immunized statements.

REASON FOR GRANTING THE PETITION

This case presents the Court with an opportunity to adopt a *per se* rule requiring the dismissal of charges where prosecutorial officials remain on a case after exposure to an accused's immunized statements.

The Fifth Amendment to the U.S. Constitution states: "No person shall be . . . compelled in any criminal case to be a witness against himself." On its face, this provision allows no exceptions. However, this Court has upheld immunity statutes on the ground that such statutes, properly drafted and administered, have the same ultimate effect as

the privilege against self-incrimination: ensuring that the witness will not later be convicted on the basis of compelled testimony. *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

The Uniform Code of Military Justice (UCMJ) has no article expressly authorizing grants of immunity. However, pursuant to his authority under Article 36, UCMJ, 10 U.S.C. § 836 (1994), to prescribe procedural rules for courts-martial, the President promulgated an immunity rule. Manual for Courts-Martial, United States (1995 ed.) (MCM), Rule for Courts-Martial (R.C.M.) 704. Under this rule, a person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial. R.C.M. 704(a)(2). In any trial of a person granted testimonial immunity after the testimony or information is given, the Government must meet a heavy burden to show that it has not used in any way for the prosecution of that person the person's statements, testimony, or information derived from them. R.C.M. 704(a), Discussion. In many cases this burden makes difficult a later prosecution of such a person for any offense that was the subject of that person's testimony or statements. *Id.* Therefore, if it is intended to prosecute a person to whom testimonial immunity has been or will be granted for the offenses about which that person may testify or make statements, it may be necessary to try that person before the testimony or statements are given. *Id.*

In *United States v. Eastman*, 2 M.J. 417 (A.C.M.R. 1975), the Army Court of Military Review stated that reversal is required *per se* where any prosecutorial official reads an accused's immunized testimony. Such officials would include the prosecuting attorneys, the staff judge

advocate, and the convening authority. The Army Court specifically reversed Eastman's conviction because the Article 32 investigating officer and the staff judge advocate read appellant's immunized testimony.

Petitioner's conviction would be overturned under the *per se* rule of *Eastman*. Several individuals in petitioner's prosecutorial chain were aware of petitioner's immunized statements and yet continued to participate in the case. The assistant prosecutor, Capt Poague, conducted the direct examination of Capt Prew, who revealed the substance of petitioner's immunized statements. Capt Poague continued to prosecute the case, over defense objection, after this exposure. LtCol Naugle, the staff judge advocate, learned of petitioner's immunized statements from Capt Prew, yet he continued to advise the convening authority about the case. Maj Walker, the Law Center Deputy Director and Military Justice Officer, knew of petitioner's immunized statements yet he and LtCol Naugle plotted strategy after the Government informant's testimony was excluded by the military judge. Finally, the convening authority, Maj Gen Blot, referred charges and appointed members after his exposure to petitioner's immunized statements via LtCol Naugle.

The Court of Appeals for the Armed Forces declined to adopt the *Eastman per se* rule. *See* (App., *infra*, at 10a-14a). This position is consistent with that of those Circuit Courts of Appeal that have addressed the issue. *See United States v. Montoya*, 45 F.3d 1286, 1292-93 (9th Cir.)(there is no *per se* rule requiring the withdrawal of a prosecutor or other government official who may have been exposed to immunized testimony), *cert. denied*, ___ U.S. ___, 116 S.Ct. 67, 133 L.Ed. 2d 29 (1995); *United States v. Crowson*, 828 F.2d 1427 (9th Cir. 1987)(declining

to adopt *per se* rule), *cert. denied*, 488 U.S. 831 (1988); *United States v. Caporale*, 806 F.2d 1487, 1518 (11th Cir. 1986)(the focus of the *Kastigar* inquiry is not whether the prosecutor was aware of the contents of the immunized testimony, but whether he used the testimony in any way to build a case against the defendant), *cert. denied*, 483 U.S. 1021 (1987); *United States v. Pantone*, 634 F.2d 716 (3d Cir. 1980)(declining to adopt *per se* rule); *United States v. Catalano*, 491 F.2d 268, 272 (2d Cir.)(declining to hold that the prosecutor's access to grand jury testimony *ipso facto* prevents the government from carrying its burden under *Kastigar*), *cert. denied*, 419 U.S. 825 (1974).

Petitioner advocates the adoption of *Eastman's per se* rule in cases like this where prosecutorial officials continue to act after exposure to an accused's immunized statements. As a practical matter there is no other way to insure compliance with *Kastigar's* prohibition on use of immunized statements. We cannot get into the mind of Capt Poague to determine what subtle or unconscious use he made of appellant's immunized statements. The same holds true for Maj Gen Blot's decision to refer charges and detail members. We also cannot know how LtCol Naugle was subconsciously affected by his exposure to appellant's immunized statements or how his advice to Maj Gen Blot was affected. *Cf. United States v. Hinton*, 543 F.2d 1002, 1010 (2d Cir. 1976)(applying *per se* rule to mandate indictment by a second grand jury where the first grand jury heard defendant's immunized testimony because the court could not peer into the minds of the grand jurors to ensure that no use had been made of the defendant's immunized testimony); *but cf. United States v. Bartel*, 19 F.3d 1105 (6th Cir.)(rejecting the *Hinton per se* rule), *cert. denied*, ___ U.S. ___, 115 S.Ct. 113, 130 L. Ed. 2d 60 (1994); *United States v. North*, 910 F.2d 843, 870 (D.C.

Cir.), *vacated in part*, 920 F.2d 940 (D.C. Cir. 1990)(same), *cert. denied*, 500 U.S. 941 (1991); *United States v. Garrett*, 797 F.2d 656 (8th Cir. 1986)(same); *United States v. Zielezinski*, 740 F.2d 727 (9th Cir. 1984)(same).

A rule of *per se* disqualification is cost effective. It is easy to get a new prosecutor, staff judge advocate or convening authority. The accused's constitutional right against self incrimination is guaranteed. The integrity of the military justice system is preserved. Moreover, the Government cannot complain about the extra burden involved in this procedure, as it presumably evaluated the extra cost of prosecution when it decided to immunize the accused.

Without a *per se* rule an accused is "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Kastigar*, 406 U.S. at 469 (Marshall, J., dissenting). Indeed, the prosecutors are alone

> in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution. A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. The good faith of the prosecuting authorities is

thus the sole safeguard of the witness' rights.

Id.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1996